

**TRIAL TRANSCRIPT VOLUME 16, PAGES 31-70
COMPLETE JURY INSTRUCTION**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

THE UNITED STATES OF AMERICA :
: Case No. 1:14-CR-1 (WLS/TQL)
v. :
: February 23, 2015
CHRISTOPHER WHITMAN, : Albany, Georgia
SHAWN MCCARTY, :
BRADFORD NEWELL, DEFENDANTS : VOLUME 16 of 23

CRIMINAL JURY TRIAL
BEFORE THE HONORABLE W. LOUIS SANDS
UNITED STATES DISTRICT JUDGE, PRESIDING

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1 So that's being done so that the Court is not
2 suggesting that that's a matter that's found as a fact,
3 but one for their guidance in determining whether that's
4 been met under the finding. And I think that's
5 consistent with everyone's understanding that that makes
6 it clearer for the jury to express its verdict.

7 I think those were the only matters that were left.
8 If I am not correct in that belief, remind me. All
9 right. Then we're going to proceed with the
10 instructions.

11 As I stated, the members of the audience will not be
12 able to leave or return during the Court's instructions.
13 So if you need to leave, you should do so now. Otherwise
14 you will be with us through the Court's instructions.
15 You may bring the jury in.

16 **MR. COONEY:** May I pass this back up, Your
17 Honor.

18 **THE COURT:** Yes.
19 *(Jury In 10:50 a.m.)*

20 **THE COURT:** You may be seated. Good morning,
21 ladies and gentlemen of the jury. I trust everyone had
22 a restful weekend. Is there anything that anyone needs
23 to bring to the Court's attention that occurred over the
24 weekend? I have not heard anything. Not hearing any,
25 all right, then we are ready to proceed with Court's

1 instructions. And basically what we'll do, I will give
2 you the bulk of the instructions now. Then we'll
3 probably take a short recess and then have the actual
4 arguments from counsel before the Court gives you final
5 instructions, just to instruct you on how we will be
6 going forward at this time.

7 Members of the jury, I will now explain the rules of
8 law that you must follow and apply in deciding this case.
9 When I have finished, and following arguments of counsel
10 and some final instructions, you will go to the jury room
11 and begin your discussions, what we call your
12 deliberations.

13 I have written my instructions and will provide you
14 a copy for reference during your deliberations, therefore
15 you may, but need not take notes or try to memorize the
16 instructions. It is important, instead, that you pay
17 close attention as I go through these instructions with
18 you.

19 It will be your duty to decide whether the
20 government has proved beyond a reasonable doubt the
21 specific facts necessary to find the defendants guilty of
22 the crimes charged in the indictment.

23 I instruct you that where I refer to the defendants
24 in these instructions, the Court is referring to
25 Christopher Whitman, Shawn McCarty, and Bradford Newell.

1 You must make your decision only on the basis of the
2 testimony and other evidence presented during trial, and
3 you must not be influenced in any way by sympathy or
4 prejudice for or against the defendants or the
5 government.

6 You must also follow the law as I explain it to you
7 whether you agree with that law or not, and you must
8 follow all of my instructions. You may not single out or
9 disregard any of the Court's instructions on the law.

10 The indictment or formal charge against a defendant
11 is not evidence of guilt. Indeed, every defendant is
12 presumed by the law to be innocent. The law does not
13 require a defendant to prove his or her innocence or to
14 produce any evidence at all.

15 The defendants do not have to testify, and if a
16 defendant or defendants choose not to testify, you could
17 not consider that in any way while making your decision.

18 The government has the burden of proving the
19 defendant's guilt beyond a reasonable doubt, and if it
20 fails to do so, you must find the defendants not guilty.

21 Thus, while the government's burden of proof is a
22 heavy burden, it is not necessary that the defendants'
23 guilt be proved beyond all possible doubt. It is only
24 required that the government's proof exclude any
25 reasonable doubt concerning the defendants' guilt.

1 A reasonable doubt is a real doubt based upon reason
2 and common sense after careful and impartial
3 consideration of all the evidence in the case. Proof
4 beyond a reasonable doubt, therefore, is proof of such a
5 convincing character that you would be willing to rely
6 and act upon it without hesitation in the most important
7 of your own affairs.

8 If you are convinced that the defendants have been
9 proved guilty beyond a reasonable doubt, say so. If you
10 are not convinced, say so. As I said earlier, you must
11 consider only the evidence that I have admitted in the
12 case.

13 The term "evidence" includes the testimony of the
14 witnesses and the exhibits admitted in the record.
15 Remember that anything the lawyers say is not evidence in
16 the case. It is your own recollection and interpretation
17 of the evidence that controls. What the lawyers say is
18 not binding upon you.

19 Also, you should not assume from anything that I may
20 have said that I have any opinion concerning any of the
21 issues in this case.

22 You must consider the case of each defendant and
23 each count separately and individually. If you find a
24 defendant guilty or not guilty of one crime, that must
25 not affect your verdict as to any other defendant or

1 count.

2 I caution you that each defendant is on trial only
3 for the specific crimes alleged in the indictment. You
4 are here to determine from the evidence in this case
5 whether each defendant is guilty or not guilty of the
6 crimes charged in the indictment.

7 You must never consider punishment in any way to
8 decide whether a defendant is guilty or not guilty. If
9 you find a defendant guilty, the punishment is for the
10 judge alone to determine later -- or to decide later.

11 In this case you have been permitted to take notes
12 during the course of the trial, and most of you, perhaps
13 all of you, have taken advantage of that opportunity and
14 have made notes from time to time.

15 You will have your notes available to you during
16 your deliberations, but you should make use of them only
17 as an aid to your memory. In other words, you should not
18 give your notes any precedence over your independent
19 recollection of the evidence or the lack of evidence, and
20 neither should you be unduly influenced by the notes of
21 other jurors.

22 I emphasize that notes are not entitled to any
23 greater weight than the memory or impression of each
24 juror as to what the testimony may have been.

25 In considering the evidence, you may make deductions

1 and reach conclusions that reason and common sense lead
2 you to make, and you should not be concerned about
3 whether the evidence is direct or circumstantial.

4 Direct evidence is the testimony of one who asserts
5 actual knowledge of a fact, such as an eye witness.

6 Circumstantial evidence is proof of a chain of facts
7 and circumstances tending to prove or disprove an
8 ultimate conclusion. The law makes no distinction
9 between the weight you may give to either direct or
10 circumstantial evidence.

11 Now, in saying that you must consider all of the
12 evidence, I do not mean that you must accept all of the
13 evidence as true or accurate. Certain charts and
14 summaries have been admitted into evidence in order to
15 summarize facts allegedly shown by documents and records
16 which themselves are too voluminous to be conveniently
17 examined in court.

18 You should consider the evidence presented
19 concerning the preparation and accuracy of those charts
20 and summaries and give each of them such weight as you
21 believe it deserves.

22 You are further instructed that with regard to any
23 such chart or summary, you may review the alleged
24 underlying evidence to determine for yourselves whether
25 the chart or summary is accurate and supported by the

1 evidence.

2 You must also decide whether you believe what each
3 witness had to say and how important that testimony was.
4 Also, the number of witnesses testifying concerning any
5 particular matter is not controlling.

6 In deciding whether you believe or do not believe
7 any witness, I suggest you ask a few questions.

8 Did the person impress you as one who was telling
9 the truth? Did the witness have any particular reason
10 not to tell the truth? Did the witness have personal
11 interest in the outcome of the case? Did the witness
12 seem to have a good memory?

13 Did the witness have the opportunity and ability to
14 observe accurately the things he or she testified about?
15 Did the witness appear to understand the questions
16 clearly and answer them directly? Did the witness's
17 testimony differ from other testimony or other evidence?

18 You should also ask yourselves whether there was
19 evidence tending to prove that the witness testified
20 falsely concerning some important fact or whether there
21 was evidence that at some other time the witness said or
22 did something, or failed to say or do something that was
23 different from the testimony the witness gave before you
24 during the trial.

25 You should keep in mind, of course, that a simple

1 mistake by a witness does not necessarily mean that the
2 witness was not telling the truth as he or she remembers
3 it, because people naturally tend to forget some things
4 or remember other things inaccurately.

5 So, if a witness has made a misstatement, you need
6 to consider whether it was simply an innocent lapse of
7 memory or an intentional falsehood, and the significance
8 of that may depend on whether it has to do with an
9 important fact or with only an unimportant detail.

10 If a witness has shown to have knowingly testified
11 falsely concerning any material matter, you have a right
12 to distrust such witness's testimony on other
13 particulars, and you may reject all the testimony of that
14 witness or give it such weight as you may think it
15 deserves.

16 The fact that a witness has been convicted of a
17 felony offense is another factor you may consider in
18 deciding whether you believe that witness. I instruct
19 you that the following offenses are felony offenses:

20 Bribery of a public official, theft by receiving
21 stolen property, and conspiracy to defraud the United
22 States.

23 You must consider some witnesses' testimony with
24 more caution than others. For example, witnesses who
25 have been promised immunity from prosecution or witnesses

1 who hope to gain more favorable treatment in their own
2 cases may have a reason to make a false statement in
3 order to strike a good bargain with the government.

4 So, while a witness of that kind may be entirely
5 truthful when testifying, you should consider that
6 testimony with more caution than the testimony of other
7 witnesses.

8 Also in this case, the government called as
9 witnesses persons with whom the government has entered
10 into plea agreements -- into a plea agreement, rather,
11 providing for the possibility of a lesser sentence than
12 the witnesses would otherwise be exposed to.

13 Such plea bargaining, as it's called, has been
14 approved as lawful and proper and is expressly provided
15 for in the rules of this court. However, a witness who
16 hopes to gain more favorable treatment in his or her own
17 case may have a reason to make a false statement because
18 the witness wants to strike a bargain with the
19 government.

20 So, while a witness of that kind may be entirely
21 truthful when testifying, you should consider that
22 testimony with more caution than the testimony of another
23 witness or of other witnesses.

24 And, of course, the fact that a witness has pled
25 guilty to a crime charged in the indictment or in a

1 separate, but related case is not evidence in and of
2 itself of the guilt of any other person.

3 Also, evidence that an alleged co-conspirator
4 pleaded guilty to a conspiracy charge in which a
5 defendant in this case was alleged to be a member is not
6 in itself evidence that any defendant on trial or anyone
7 else was a member of the conspiracy to which the witness
8 pleaded guilty, nor is the witness's guilty plea evidence
9 that any defendant on trial in this case was a member of
10 a conspiracy as alleged by the government, but not
11 charged in this trial.

12 You have heard testimony of statements allegedly
13 made by an alleged co-conspirator of one or more of the
14 defendants. None of the defendants in this case are
15 charged with conspiracy in the indictment. However, you
16 may consider whether there is sufficient evidence to
17 prove a conspiracy beyond a reasonable doubt of which a
18 defendant in this case and the alleged co-conspirator
19 were members in considering whether an alleged statement
20 made during the alleged conspiracy and in furtherance of
21 -- let me state that again.

22 However, you may consider whether there is
23 sufficient evidence to prove a conspiracy, beyond a
24 reasonable doubt, of which a defendant in this case and
25 the alleged co-conspirator were members in considering

1 whether an alleged statement was made during the alleged
2 conspiracy and was in furtherance of the conspiracy.

3 Since co-conspirators are agents of each other, the
4 statements of each may be attributed to the other if made
5 during the alleged conspiracy and made in furtherance of
6 the alleged conspiracy.

7 A conspiracy is an agreement by two or more persons
8 to commit an unlawful act where at least one of the
9 co-conspirators does some act to effect an object of the
10 conspiracy. In other words, it is a kind of partnership
11 for criminal purposes. Every member of the conspiracy
12 becomes the agent or partner of every other member.

13 None of the defendants in this case are charged with
14 a conspiracy. If you find that an alleged conspiracy has
15 been proven, you may only consider that alleged
16 conspiracy only for the purpose of the determining
17 whether the alleged statements were made and whether they
18 were made in furtherance of the conspiracy.

19 If you find that the alleged conspiracy has not been
20 proven or that the alleged statements were either not
21 made at all or were not made in furtherance of the
22 alleged conspiracy, you may not attribute any such
23 statements to the alleged co-conspirator defendant on
24 trial.

25 Whether the government has proven a conspiracy as

1 alleged, although not charged in the indictment, and
2 whether any statement attributed to an alleged
3 conspirator was, in fact, made and whether such as
4 statement was in furtherance of the alleged conspiracy is
5 for you to determine upon the facts and circumstances as
6 shown by the evidence as you find the evidence to be
7 beyond a reasonable doubt.

8 When scientific, technical, or other specialized
9 knowledge might be helpful, a person who has special
10 training or experience in that field is allowed to state
11 an opinion about the matter. However, that does not mean
12 that you must accept the witness's opinion. As with any
13 other witness's testimony, you must decide for yourself
14 whether to rely upon that opinion.

15 The government must prove beyond a reasonable doubt
16 that each defendant was the person who committed the
17 crimes charged in the indictment. If a witness
18 identifies a defendant as a person who committed a crime
19 charged, you must first decide, as with any other
20 witness, whether that witness is telling the truth.
21 Then, if you believe the witness was truthful, you decide
22 how accurate the identification was.

23 Again, I suggest that you ask yourself a number of
24 questions. Did the witness have an adequate opportunity
25 at the time of the alleged crime to observe the person in

1 question? What length of time did the witness have to
2 observe the person? What were the prevailing conditions
3 at the time in terms of visibility or distance and the
4 like? Had the witness known or observed the person at
5 earlier times?

6 After examining all the evidence, if you have a
7 reasonable doubt that a defendant was the person who
8 committed the crime or crimes charged against him in the
9 indictment, you must find that defendant not guilty.

10 Now, at this time I will explain the indictment
11 which outlines the offenses charged against the
12 defendants, which are called counts.

13 Defendant Christopher Whitman is charged in 54
14 offenses in the indictment. Counts 1 through 30, 31
15 through 33, 35 through 47, 48, 49, and 51 through 56.

16 Defendant Shawn McCarty is charged with 32 offenses
17 in the indictment. Counts 4 through 30, 34, and 57.

18 Defendant Bradford Newell is charged with 15
19 offenses in the indictment. Counts 35 through 47, 50,
20 and 51.

21 A copy of the indictment will be available to you
22 for your reference during your deliberations, however
23 remember that the indictment is not evidence of guilt or
24 of anything else in this case.

25 Defendant Whitman is charged with participating in

1 an alleged transportation scheme to deprive the United
2 States of money, property, and honest services through
3 use of interstate wires in Counts 1 through 30 of the
4 indictment.

5 Defendant McCarty is charged with participating in
6 an alleged transportation scheme to deprive the United
7 States of money, property, and honest services through
8 use of interstate wires in Counts 4 through 30 of the
9 indictment.

10 Defendants Whitman and Newell are charged with
11 participating in an alleged theft scheme to deprive the
12 United States of money, property, and honest services
13 through the use of interstate wires in Counts 35 through
14 47 of the indictment.

15 It is a federal crime to use interstate wire
16 communications to carry out a scheme or artifice to
17 defraud someone else of money or property or to defraud
18 or deprive someone else of a right to honest services.

19 With respect to Counts 1 through 30 and 35 through
20 47, a defendant can be found guilty of this crime only if
21 all of the following facts are proved beyond a reasonable
22 doubt.

23 One, the defendant knowingly devised or intended to
24 devise a scheme or artifice; (A) to the defraud the
25 United States or the Department of Defense of money or

1 property; and/or (B), to defraud or deprive the United
2 States, the Department of Defense, or the citizens of the
3 United States of the intangible right of honest services
4 through bribery.

5 Two, the defendant did so with the specific intent
6 to defraud. Three, the scheme or artifice involved a
7 material misrepresentation, false statement, false
8 pretense, or concealment of fact. And, four, the
9 defendant transmitted or caused to be transmitted by wire
10 some communication in interstate commerce to help carry
11 out the scheme or artifice to defraud.

12 A scheme or artifice to defraud includes any plan or
13 course of action intended to deceive or cheat someone out
14 of money, property, or honest services by using false or
15 fraudulent statements, pretenses, representations, or
16 promises.

17 A statement or representation is false or fraudulent
18 if it is about a material fact that the speaker knows is
19 untrue or makes with reckless indifference to the truth
20 and makes with the intent to defraud.

21 A statement or representation may be false or
22 fraudulent when it is a half truth or effectively
23 conceals a material fact and is made with the intent to
24 defraud.

25 The government must prove beyond a reasonable doubt

1 that the schemes or artifices alleged involved a material
2 misrepresentation, false statement, false pretense, or
3 concealment of a material fact.

4 A representation, statement, false pretense, or
5 omission is material if it has the capacity or natural
6 tendency to influence a person's decision. It does not
7 matter whether the decision maker actually relied on the
8 statement or knew or should have known that the statement
9 was false.

10 The intent to defraud is the specific intent to
11 deceive or cheat someone, usually for personal financial
12 gain or to cause financial loss to another person or
13 entity.

14 The government must prove the schemes or artifices
15 alleged in the indictment beyond a reasonable doubt and
16 substantially as alleged. Therefore, if you find based
17 upon the evidence that an alleged scheme or artifice was
18 not proved substantially as alleged beyond a reasonable
19 doubt, or, that a scheme or artifice was proved that is
20 substantially different than the scheme or artifice
21 alleged, then the government will not have met its
22 burden, and you must find the defendant or defendants not
23 guilty as to the scheme or artifice alleged.

24 However, the government does not have to prove every
25 detail of the alleged scheme or artifice as alleged in

1 the indictment. The government is not required to prove
2 that the material transmitted by interstate wire was
3 itself false or fraudulent, or, that using the wire was
4 intended as a specific or exclusive means of carrying out
5 the alleged fraud, or, that a defendant personally made
6 transmission over the wire.

7 The government also does not have to prove that the
8 alleged scheme or artifice actually succeeded in the
9 defrauding anyone.

10 Each separate use of interstate wire communications
11 alleged as a part of a scheme or artifice to defraud, if
12 proved beyond a reasonable doubt, is a separate crime.

13 The government alleges in Counts 1 through 30 that
14 Defendant Whitman participated in a transportation scheme
15 or artifice, and in Counts 4 through 30 that Defendant
16 McCarty participated in a transportation scheme or
17 artifice.

18 The government also alleges in Counts 35 through 47
19 that Defendants Whitman and Newell participated in a
20 theft scheme or artifice.

21 The government alleges that each of these
22 transportation and theft schemes or artifices involved
23 two objects.

24 The first alleged object was to fraudulently defraud
25 the United States Department of Defense of money or

1 property: The money or property object.

2 The second alleged object was to fraudulently
3 defraud or deprive through bribery the United States, the
4 Department of Defense, or the citizens of the United
5 States of the intangible right of honest services: The
6 honest services object.

7 The government does not have to prove that each
8 alleged scheme or artifice involved both alleged objects.

9 You may find the particular defendant about whom you
10 are deliberating guilty of wire fraud if you find beyond
11 a reasonable doubt that he knowingly with the intent to
12 defraud devised or participated in a scheme or artifice
13 involving either the money or property object or the
14 honest services object or both of those objects.

15 However, honest services fraud criminalizes only
16 schemes or artifices to defraud that involve bribery or
17 kickbacks as alleged. Thus, if you find that any
18 defendant did not engage in bribes or kickbacks, you must
19 return a verdict of not guilty for the counts against the
20 defendant charging wire fraud unless you find beyond a
21 reasonable doubt that he devised or participated in a
22 scheme or artifice involving the alleged money or
23 property object.

24 If the government proves neither of the alleged
25 objects beyond a reasonable doubt, you must find the

1 defendant not guilty of the alleged scheme or artifice
2 crimes.

3 I will describe both alleged objects of the alleged
4 schemes or artifices to you in more detail now.

5 To defraud someone of money or property is to
6 deceive or cheat them out of money or property.

7 To defraud or deprive someone else of the intangible
8 right of honest services is to violate or to cause a
9 public official to violate a duty to provide honest
10 services to the United States Government, Department of
11 Defense, or the citizens of the United States through
12 bribery.

13 In order for you to find that the defendant or other
14 person was a public official at the time of the crime
15 charged, the government must prove beyond a reasonable
16 doubt that the defendant or other person was an officer
17 or employee or a person acting for or on behalf of the
18 United States or any department, agency, or branch of
19 government thereof in any official function under or by
20 authority of any such department, agency, or branch of
21 government.

22 A person who is not an employee or officer of the
23 United States, but who functions under or by authority of
24 any such department, agency, or branch of the United
25 States Government may be a public official.

1 To be a public official an individual must possess
2 some degree of official responsibility. The person need
3 not be an employee of the federal government. The
4 definition of public official is broad enough to cover
5 persons working for private organizations so long as the
6 government has proven beyond a reasonable doubt that the
7 person is a public official.

8 But the mere presence of a defendant or other person
9 employed by a private organization at a government
10 department, agency, branch, or contractor is not enough
11 to make that defendant or other person a public official.

12 Public officials must act in the public's best
13 interest. In other words, they have a duty to the public
14 to do what is best and what is right for the public with
15 respect to their official duties and employment.

16 So, if an official does something or makes a
17 decision that serves the official's personal interest by
18 taking a bribe, the official or employee defrauds the
19 public of honest services, even if the public agency
20 suffers no monetary loss. The wrong, if done, is
21 accepting payment of a bribe for the public official's
22 official action.

23 A kickback is any kind of secret payment or reward a
24 person gives to an employee who has been dealing in the
25 course of employment with the person so that the

1 employee's personal financial interest interferes with
2 the employee's obligation to act in the best interest of
3 his or her employer.

4 The government must prove beyond a reasonable doubt
5 that the defendant intended to breach or cause a breach
6 of the public official's duty and foresaw or should have
7 foreseen that the United States, the Department of
8 Defense, or the citizens of the United States might
9 suffer a loss as a result of the breach. However, the
10 government need not prove that any loss actually occurred
11 as a result of the breach.

12 The defendant need not himself be a public official
13 to be guilty of honest services fraud. Although a
14 private citizen does not owe a duty of honest services to
15 the public, a private citizen can be found guilty of
16 honest services fraud if he knowingly devises or
17 participates in a scheme or artifice intended to deprive
18 the public of its right to a public official's honest
19 services through bribery.

20 The indictment alleges that the defendants committed
21 honest services fraud by means of bribery. Bribery
22 requires a specific intent to give or receive something
23 of value in exchange for one or more official acts.

24 I will define bribery for you in more detail in just
25 a few moments when I instruct you about the elements of

1 the bribery offense charged in the indictment.

2 But, I instruct you that -- now, that in order to
3 find that the defendants committed honest services fraud
4 by means of bribery you must find that the government has
5 proved beyond a reasonable doubt that the defendants
6 committed bribery.

7 To act with intent to defraud means to act knowingly
8 and willfully with the specific intent to deceive
9 someone, usually for personal financial gain, or to cause
10 financial loss to some else.

11 To use or cause interstate wire communications to be
12 used is to act so that something would normally be sent
13 through wire in the normal course of business. This
14 includes transferring money by wire from a person,
15 entity, or bank in one state to a person, entity, or bank
16 in another state.

17 To transfer something by wire means to transmit any
18 writings, sign, signal, picture, or sound, in whole or in
19 part, through the use of facilities for the transmission
20 of communications by the aid of wire, cable, or other
21 like connection between the point of origin and the point
22 of reception, including the use of such connection in a
23 switching station furnished or operated by any person
24 engaged in providing or operating such facilities for the
25 transmission of interstate or foreign communications or

1 communications affecting interstate or foreign commerce.

2 Interstate means between a place in one state or
3 territory of the United States and a place in another
4 state or territory of the United States.

5 Foreign means between someplace within the United
6 States and a place outside of the United States.

7 The government does not have to prove that the
8 material wired was false -- was itself false or
9 fraudulent or that the use of the interstate wire was
10 intended as a specific or exclusive way to carry out the
11 alleged fraud.

12 The government also does not have to prove that the
13 defendant actually wired the material or that he was
14 directly or personally involved in the wire so long as is
15 the wire was reasonable foreseeable in the execution of
16 the alleged scheme or artifice to defraud. The wire
17 must, however, further or assist in carrying out the
18 scheme or artifice to defraud charged.

19 Defendant Whitman is charged with bribing public
20 officials in Counts 31 through 33 of the indictment, in
21 connection with alleged transportation scheme or
22 artifice, and in Counts 48 and 49 of the indictment, in
23 connection with the alleged theft scheme or artifice.

24 It is a federal crime for anyone to bribe a public
25 official. Defendant Whitman can be found guilty of this

1 crime only if all of the following are proved beyond a
2 reasonable doubt.

3 One, the defendant directly or indirectly gave,
4 offered, or promised something of value to a public
5 official; and, two, the defendant acted knowingly and
6 corruptly with the intent to influence an official act,
7 to influence the public official to allow or make an
8 opportunity for the commission of a fraud on the United
9 States, or to induce the public official to violate the
10 public official's lawful duty by failing to do an act.

11 It is also a federal crime for a public official to
12 solicit, accept, or agree to accept a bribe.

13 Defendant McCarty is charged with bribery in Count
14 34 of the indictment in connection with the alleged
15 transportation scheme or artifice.

16 Defendant Newell is charged with bribery in Count 50
17 of the indictment in connection with the alleged theft
18 scheme or artifice.

19 Defendant McCarty and Defendant Newell can be found
20 guilty of bribery only if all of the following facts are
21 proved beyond a reasonable doubt.

22 One, the defendant at the time of the charge -- of
23 the charged offense was a public official; two, the
24 defendant received or accepted or agreed to receive or
25 accept either personally or for another person or entity

1 something of value; and, three, the defendant did so
2 knowingly and corruptly in return for being influenced in
3 the performance of an official act, being influenced to
4 allow or make an opportunity for the commission of a
5 fraud on the United States or being induced to violate
6 the defendant's lawful duty by failing to do some act.

7 As to the bribery offenses with which Defendants
8 McCarty and Newell are charged, the government must prove
9 beyond a reasonable doubt that Defendants McCarty and
10 Newell were public officials at the time of the bribery
11 charged.

12 Whether the defendants were public officials is a
13 question of fact for the jury to determine based upon the
14 facts and circumstances as shown by the evidence as you
15 find it to be beyond a reasonable doubt.

16 An "official act" means any decision or action on
17 any matter brought before a public official for a
18 decision to be acted on in such official's official
19 capacity.

20 "Something of value" includes a thing possessing
21 intrinsic value, whether intangible -- rather, whether
22 tangible or intangible, that person giving or offering or
23 the person soliciting or receiving considers to be worth
24 value. Something of value may include a sum of money, an
25 item of value, favorable treatment, or a job offer.

1 To act corruptly means to act knowingly and
2 dishonestly for a wrongful purpose. The government must
3 prove beyond a reasonable doubt that the defendants
4 charged with bribery intended to exchange money or
5 something of value for official action.

6 The government may, but is not required to prove
7 that each payment or bribe correlated exactly in time
8 with a specific official act. However, the government
9 must prove beyond a reasonable doubt that the money or
10 thing of value given was for an official act.

11 The requirement that there be payment of a thing of
12 value in return for the performance of an official act
13 may be satisfied where the evidence shows a course of
14 conduct of things of value following to an agent in
15 exchange for a pattern of official actions favorable to
16 the donor. In other words, the intended exchange in
17 bribery can be this for these or these for these, as well
18 as this for that.

19 It must be shown beyond a reasonable doubt that a
20 payment or payments were made with the intent of securing
21 official action in return.

22 If you find beyond a reasonable doubt that the
23 alleged payor offered or provided a thing of value in
24 exchange for the performance of official action, then it
25 makes no difference that the payor may also have had

1 another lawful motive for providing a thing of value.

2 Likewise, if you find beyond a reasonable doubt than
3 an official solicited or received a thing of value as
4 alleged in exchange for the performance of an alleged
5 official action, then it makes no difference that the
6 official may have had another lawful motive for
7 soliciting or accepting the thing of value.

8 What is required is that the government prove beyond
9 a reasonable doubt that the official solicited or
10 received the alleged thing of value at least in part in
11 exchange for the performance of an official act.

12 Therefore, it is not a defense to claim that an
13 agent or official would have lawfully performed the
14 official action in question even without having accepted
15 a thing of value.

16 In other words, it is not a defense that the offer
17 or promise of anything of value was made to the agent or
18 official in exchange for an official action that is
19 actually lawful, desirable, or even beneficial to the
20 public.

21 The offense of bribery, as well as honest services
22 fraud, in connection with a bribe is not concerned with
23 the wisdom or results of the public official's decisions
24 or actions, but rather with whether the public official
25 makes his or her decisions or takes his or her actions

1 with respect to a bribe as alleged.

2 You will note that several times during the course
3 of these instructions I have stated that in order for the
4 defendant to be guilty of a particular offense, that is,
5 bribery and obstruction of justice, the government must
6 prove that the defendant acted corruptly.

7 If you find that a defendant paid money or gave
8 something of value to a public official, but did so
9 solely as a result of coercion and not corruptly, you
10 must conclude that the defendant did not act with corrupt
11 intent. In that event, as to that charge, you must find
12 the defendant not guilty.

13 Whether a defendant was coerced is a question of
14 fact for the jury to determine upon the facts and
15 circumstances as you find them beyond a reasonable doubt
16 based on the evidence.

17 A defendant is not required to prove coercion. The
18 government must instead prove beyond a reasonable doubt
19 that the defendant acted corruptly.

20 If you find upon the evidence beyond a reasonable
21 doubt that the defendant acted corruptly, you may find
22 the defendant guilty of that charge if the government has
23 proved all the other necessary facts beyond a reasonable
24 doubt.

25 As I have instructed you, the burden is never upon a

1 defendant to prove his innocence. The burden is always
2 upon the government to prove each defendant's guilt
3 beyond a reasonable doubt.

4 Defendant Whitman and Defendant Newell are charged
5 with theft of government property in Count 51 of the
6 indictment. It is a federal crime to steal or convert
7 any money or property belonging to the United States and
8 worth more than \$1,000.

9 Defendant Whitman and Defendant Newell can be found
10 guilty of this crime only if all of the following facts
11 are proved beyond a reasonable doubt.

12 One, some or all of the property allegedly stolen
13 belonged to the United States; two, the defendant stole
14 or knowingly converted to his use -- to his own use or to
15 someone else's use some or all of the allegedly stolen
16 property that you find beyond a reasonable doubt belonged
17 to the United States; three, the defendant knowingly and
18 willfully intended to deprive the owner of the use or
19 benefit of the property; and, four, the total value of
20 the property belonging to the United States that was
21 stolen or converted by the defendant had a value greater
22 than \$1,000.

23 The United States refers to the government, which
24 includes the Department of Defense, the United States
25 Marine Corps, Defense Logistics Agency, and other

1 government entities.

2 The word "value" means the greater of; one, the
3 face, par, or market value; or, two, the price, whether
4 wholesale or retail.

5 The defendant need not know that the government
6 owned the property, but it must be proved beyond a
7 reasonable doubt that the government did, in fact, own
8 the property, that the defendant knowingly stole or
9 converted it, and that the value was greater than \$1,000.

10 "To steal or convert" means to wrongly or
11 intentionally take money or property belonging to someone
12 else with the intent to deprive the owner of its use or
13 benefit, permanently or temporarily.

14 A taking does not have to be any particular type of
15 movement or carrying it away, but any appreciable and
16 intentional change in the property's location is a
17 taking, even if the property is not removed from the
18 owner's premises.

19 The word "willfully" as used in these instructions
20 means that the act was committed voluntarily and
21 purposely with the intent to do something that the law
22 forbids, that is, with the bad purpose to disobey or
23 disregard the law.

24 For the defendants to be found guilty of this
25 offense the government is not required to prove that

1 every item of property allegedly stolen belonged to the
2 United States and was stolen or converted by the
3 defendants.

4 It is sufficient for the government to prove either
5 that, one, some or all the allegedly stolen property
6 items belonged to the United States and was or were
7 stolen or converted by the defendant, as long as the
8 total value of the stolen or converted property exceeded
9 \$1,000 in value.

10 In some cases a defendant is charged with breaking a
11 law that actually covers two separate crimes. A lesser
12 include offense is a crime that isn't as serious as the
13 other crime a defendant is charged with.

14 If you find Defendant Whitman or Defendant Newell
15 not guilty of the crime charged in Count 51, you must
16 determine whether that defendant is guilty of the lesser
17 included offense.

18 Proof of the lesser included offense requires proof
19 beyond a reasonable doubt of the facts necessary to prove
20 the crime charged in Count 51 except the fact that the
21 property exceeded \$1,000 in value.

22 Defendant Whitman is charged with obstruction of
23 official proceedings in Counts 52 and 54 through 56 of
24 the indictment. Defendant McCarty is charged with this
25 offense in Count 57 of the indictment. It is a federal

1 crime to corruptly obstruct, influence, or impede an
2 official proceeding or to an attempt to do so.

3 Defendant Whitman and Defendant McCarty can be found
4 guilty of this crime only if all of the following facts
5 are proved beyond a reasonable doubt.

6 One, the defendant attempted to or did, A, cause the
7 alteration, destruction, mutualization, or concealment of
8 an object with the intent to impair the object's
9 integrity and availability for use in the alleged
10 official proceeding; or, B, obstructed, influenced, or
11 impeded an official proceeding.

12 Two, the defendant acted corruptly; and, three, the
13 defendant either knew about an alleged official
14 proceeding or knew that the nature and probable effect of
15 the conduct would interfere with that alleged official
16 proceeding.

17 With regard to Counts 52, 54, 55, and 57, the term
18 "official proceeding" means grand jury investigation.
19 And with regard to Counts 56 -- to Count 56 the term
20 "official proceeding" means a civil or criminal
21 forfeiture proceeding.

22 An official proceeding need not be pending or about
23 to be instituted at the time of the act or acts alleged.
24 However, the government must prove beyond a reasonable
25 doubt that the defendant foresaw the particular official

1 proceeding when committing an alleged act.

2 The defendant can be found guilty of this offense
3 for attempting to commit it, even if the attempt fails.

4 To establish an attempt the government must prove
5 beyond a reasonable doubt that the defendant knowingly
6 intended to commit the crime of obstructing an official
7 proceeding.

8 The defendant's intent must be strongly corroborated
9 by his taking a substantial step toward committing the
10 crime.

11 A substantial step is an important action leading up
12 to committing the offense, not just an inconsequential
13 act. It must be more than simply preparing. It must be
14 an act that would normally result in committing the
15 offense.

16 As I instructed you earlier, the term "corruptly"
17 means to act dishonestly with an improper purpose,
18 personally or by so influencing another to so act.

19 This may include making a false or misleading
20 statement or withholding, concealing, altering, or
21 destroying a record, document, or other object.

22 Defendant Whitman is charged with destroying
23 documents or records in a federal investigation in Count
24 53 of the indictment.

25 It is a federal offense to destroy or conceal a

1 document or records in federal investigations. Defendant
2 Whitman can be found guilty of this crime only if all of
3 the following facts are proved beyond a reasonable doubt.

4 One, the defendant knowingly, altered, destroyed,
5 mutilated, concealed, or covered up any record, document,
6 or tangible object.

7 Two, the defendant did so with the intent to impede,
8 obstruct, or influence an investigation.

9 And, three, the investigation was within the
10 jurisdiction of the National Crime Investigative Service,
11 NCIS, which is an agency of the United States.

12 In order for Defendant Whitman to be found guilty of
13 this charge, you need not find that an investigation was
14 pending at the time of the alleged document destruction
15 if you find that the government has proved or proven
16 beyond a reasonable doubt that Defendant Whitman took the
17 alleged actions to destroy documents in relation to or in
18 contemplation of an investigation.

19 You have heard testimony that allegedly after the
20 schemes or artifices alleged in the indictment were
21 supposed to have been committed and were discovered by
22 law enforcement Defendants Whitman and McCarty allegedly
23 took actions that could have concealed those schemes and
24 artifices.

25 If you find beyond a reasonable doubt that Defendant

1 Whitman or Defendant McCarty committed the alleged acts,
2 then you may consider this conduct, along with all the
3 evidence, in deciding whether the government has proved
4 beyond a reasonable doubt that Defendant Whitman
5 committed the wire fraud, bribery, and theft offenses
6 with which he is charged and in deciding whether
7 Defendant McCarty committed the wire fraud and bribery
8 offenses with which he is charged.

9 This alleged conduct may indicate that the
10 defendants thought they were guilty and were trying to
11 avoid detection and punishment. On the other hand, an
12 innocent person may do the alleged acts for some other
13 innocent reason. However, you may consider such
14 evidence, if any has been presented, that Defendant
15 Whitman engaged in the action of concealment only against
16 him. Likewise, you should consider such evidence, if
17 any, that Defendant McCarty engaged in acts of
18 concealment only against him.

19 Members of the jury, it is possible to prove a
20 defendant guilty of a crime even without evidence that
21 the defendant personally committed every act charged.

22 Ordinarily any act a person can do, may be done by
23 directing another person or agent, or it may be done by
24 acting with or under the direction of others.

25 A defendant aids and abets a person if the defendant

1 intentionally joins with another person to commit the
2 crime charged. A defendant is criminally responsible for
3 the acts of another person if the defendant aids and
4 abets the other person.

5 A defendant is also responsible if the defendant
6 willfully directs or authorizes the acts of an agent,
7 employee, or other associate in the commission of the
8 crime charged.

9 But, finding that a defendant is criminally
10 responsible for the acts of another person requires proof
11 that the defendant knowingly and intentionally associated
12 with or participated in the crime.

13 A defendant's participation in the crime is not
14 established by proof that the defendant was simply
15 present at the scene of a crime or knew about it.

16 In other words, in order to find the defendant
17 guilty, you must find beyond a reasonable doubt that the
18 defendant was a willful participant in the crime and not
19 merely a knowingly spectator.

20 You will note that the indictment charges that the
21 offenses were committed on or about a certain date or
22 time period. The government does not have to prove with
23 certainty the exact date or time period of the alleged
24 offense. It is sufficient if the government proves
25 beyond a reasonable doubt that the offense was committed

1 on a date or during a time period reasonably near the
2 date or time period alleged.

3 As used in the indictment and in these instructions,
4 the word "knowingly" means that an act was done
5 voluntarily and intentionally and not because of mistake
6 or accident or another innocent reason.

7 As used in these instructions, the word "willfully"
8 means that the act was committed voluntarily and
9 purposely with the intent to do something the law
10 forbids, that is, with bad purpose to disobey or
11 disregard the law.

12 While the defendants must have acted with intent to
13 do something the law forbids before you can find they
14 acted willfully, the defendants need not be aware of the
15 specific law or rule that their conduct may have
16 violated.

17 Intent and knowledge exists in a person's mind and
18 cannot always be proved by exact and demonstrable
19 evidence. Therefore, one's intent and knowledge has to
20 be judged, to a certain extent at least, by his knowledge
21 as shown by the evidence and generally by judging him as
22 reasonable, prudent persons experienced in the everyday
23 affairs of life judge one another. We cannot look into a
24 person's mind and see what he intends or knows today or
25 what he intended or knew yesterday. But that does not

1 mean that in a court of law his intent and knowledge
2 cannot be ascertained or established.

3 The law says that a jury is authorized to infer a
4 person's intent and knowledge from his conduct, what he
5 does, what he says, and how he acts in accordance with
6 the axiom that sometimes actions speak louder than words.

7 Now, intent and motive should never be confused.
8 Motive is what prompts a person to act or fail to act.
9 Intent refers only to the state of mind with which the
10 act is done.

11 Person advancement and financial gain are two well-
12 recognized motives for much of human conduct. These
13 laudable motives may prompt one person to voluntary acts
14 of good and another to voluntary acts of crime.

15 Good motive alone is never a defense where the act
16 done or omitted is a crime. So the motive of a defendant
17 is immaterial except insofar as evidence of motive may
18 aid you in your determination of his state of mind or
19 intention.

20 Now, ladies and gentlemen, at this point I'm going
21 to stop, and we are going to first take a short break,
22 and we'll come back with the actual arguments in the
23 case, and then, I'll give you some final instructions. I
24 do want to give you one instruction with regard to the
25 evidence in the case before the lawyers argue.

1 There was an exhibit that was admitted into the
2 evidence, Exhibit 12-3, which was described as a resume.
3 That is stricken and is no longer a part of the evidence
4 in the case so you may not consider that exhibit at all
5 or any of the testimony about it.

6 Remember, I told you early in the case that if you
7 are instructed not to consider a certain matter or to
8 consider it for limited purposes, you must comply with
9 the Court's instruction.

10 So the instruction here is that that will not be
11 given any consideration whatsoever in your deliberations.

12 So with that, I'm going to let you go at this time
13 for first break of the day, I guess, kind of your second
14 break of the day, and then we'll come back and then hear
15 arguments. You may go out at this time.

16 *(Jury Excused, 11:49 a.m.)*

17 **THE COURT:** All right, you may be seated.
18 Tiffany let me know, one thing I did not mention it
19 before I began the instruction to the jury, but you will
20 notice, Mr. Garland in particular, that the Court did
21 change the language a bit with regard to the obstruction
22 of official proceeding that makes it clear that I'm
23 referring to that proceeding, both by identifying it in
24 the body and making it clear that it relates to it. But
25 I didn't go as far as you wanted me to go to say they

1 would have to have specific knowledge of it, but it's
2 clear that it is the thing that the knowledge or
3 contemplation has to relate.

4 **MR. GARLAND:** I'm not sure I fully heard the
5 last thing you said about specific.

6 **THE COURT:** Okay. In other words, it
7 specifically identifies the proceeding as being the grand
8 jury proceeding.

9 **MR. GARLAND:** Yes, and I caught that, and it
10 uses the word. I'm going to argue that, that that means
11 the grand jury proceeding.

12 **THE COURT:** Yeah, yeah. And so that was made
13 clear. I think I had stated in the body, but the way it
14 was generalized in the elements it did not make it clear.
15 So we changed that to make sure that that was clear that
16 it's the one that was alleged in the indictment.

17 I think it doesn't have to be a particular
18 proceeding, but I think where the government alleges that
19 in the indictment, that's what it's got to be. Otherwise
20 it would be a variance, as you argued. All right. I
21 think everything else I did mention to you. Okay. Well,
22 let's take about 20 minutes, then we'll come back with
23 the government's opening. If you all want to set up
24 however you want to. Because we have jurors in the front
25 here, it makes it a little more different than you might